

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants.)	

**DEFENDANTS’ RESPONSE IN OPPOSITION TO PLAINTIFFS’ MOTIONS IN
LIMINE PERTAINING TO ALTERNATE SOURCES OF PHOSPHORUS AND
BACTERIA TO THE IRW [Dkt. No. 2436] AND BACTERIAL OR PHOSPHORUS
LEVELS IN OTHER WATERSHEDS [Dkt. No. 2411]**

Defendants respectfully submit this consolidated brief in opposition to Plaintiffs’ Motion in Limine Pertaining To Other Contributors Of Phosphorus And Bacteria To The IRW” (Dkt. #2436) and Plaintiffs’ Motion in Limine To Preclude Argument, Questioning Or Introduction Of “Evidence” By Defendants Pertaining To Bacterial Or Phosphorus Levels In Waters Other Than Those Of The IRW (Dkt. #2411). These motions seek to preclude discussion of alternate sources of bacteria or phosphorous within the IRW, or levels of bacteria or phosphorous in other watersheds. Both types of evidence are relevant to Plaintiffs’ inability to prove that poultry litter, as opposed to some other source, is responsible for bacteria or phosphorous found in the waters of the IRW, and are therefore admissible under Federal Rules of Evidence 401 and 402. Moreover, evidence of other contributors of phosphorus and bacteria is also relevant to the availability of joint and several liability for certain counts and bears upon the Court’s determinations regarding injunctive relief. Plaintiffs’ motions should therefore be denied.

ARGUMENT

Evidence is considered relevant to the extent that it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. Relevant evidence is generally admissible. Fed. R. Evid. 402. ““The determination of whether the evidence is relevant is a matter within the sound discretion of the trial court.”” *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1518 (10th Cir. 1995) (quoting *Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 566 (10th Cir. 1978)).

I. EVIDENCE REGARDING OTHER CONTRIBUTORS OF BACTERIA AND PHOSPHORUS TO THE IRW AND BACTERIAL OR PHOSPHORUS LEVELS IN OTHER WATERSHEDS IS RELEVANT EVIDENCE OF LACK OF CAUSATION

Plaintiffs seek to exclude as irrelevant any discussion of alternate sources and levels of bacteria and phosphorous within and without the IRW. *See* Dkt. No. 2411 at 2-3; Dkt. No. 2436, at 3-8. However, evidence of other sources of bacteria and phosphorus in the IRW and of similar bacteria and phosphorus levels in waters outside the IRW, particularly those where there is little poultry farming, is relevant to causation. Causation is a necessary element of any tort claim, including the torts of nuisance and trespass. *See Twyman v. GHK Corp.*, 93 P.3d 51, 54 n. 4 (Okla. Civ. App. 2004); *Angell v. Polaris Prod. Corp.*, 280 Fed. Appx. 74, 2008 U.S. App. LEXIS 12007 (10th Cir. June 4, 2008). Plaintiffs must show that Defendants’ actions caused the injury of which they complain:

In all tort cases, the plaintiff must prove that each defendant’s conduct was an actual cause, also known as cause-in-fact, of the plaintiff’s injury: Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictates that there be some causal relationship between the defendant’s conduct and the injury or event for which damages are sought.

City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110, 113-14 (Mo. 2007) (quotations omitted); *see also* Defendants’ Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 6, and 10 Due to Lack of Defendant-Specific Causation and Dismissing Claims of Joint and Several Liability Under Counts 4, 6, and 10, Dkt. No. 2069 (May 18, 2009) (“Causation Motion”).

As the Court itself previously recognized, both sorts of evidence that Plaintiffs seek to exclude are directly relevant to a central disputed fact, specifically whether bacteria or phosphorous found in the waters of the IRW can be traced back to poultry litter. In denying Plaintiffs’ motion for a preliminary injunction the Court pointed specifically to each type of evidence. First, the Court noted that Plaintiffs had failed to “prov[e] that bacteria in the waters of the IRW are caused by the application of poultry litter rather than by other sources, including cattle manure and human septic systems.” *See* Opinion & Order, Dkt. No. 1765, at 1-2 (Sept. 29, 2008). Second, the Court observed that “[t]he record reflects levels of fecal bacteria at similar levels in rivers and streams throughout the State of Oklahoma, including waterways in whose watersheds the record does not evidence similar application of poultry waste.” *Id.* at 7.

As the Court’s ruling appreciated, such evidence is relevant to establishing whether bacteria or phosphorous found in the environment may be traced back to poultry litter. The Court noted during the recent *Daubert* hearings that Plaintiffs have not performed any fate and transport analysis in the IRW to track specifically the movement of constituents of poultry litter through the environment or account for alternate sources of those constituents. *See* Ex. 1 (Transcript of July 28, 2009 Hearing) at 249:2-16; Ex. 2, (Transcript of July 29, 2009 Hearing) at 376:1-2. Indeed, Plaintiffs’ experts acknowledge that they cannot associate any particular instance of alleged pollution in the IRW with any particular field or litter application associated with any particular defendant. *See* Ex. 3 (Fisher 9-3-08 Dep.) at 80:14-82:17, 86:18-88:2; Ex. 4

(Olsen 9-10-08 Dep.) at 46:24-47:25. The Court has now excluded Plaintiffs’ two key causation witnesses, Drs. Harwood and Olsen, whose testimony was designed to circumvent this want of proof. *See* Minute Sheets, Dkt. Nos. 2386 & 2387 (July 30, 2009). Without their source tracking testimony, Plaintiffs are left to argue that the mere fact that poultry litter contains bacteria and phosphorous and is land applied makes it more likely than not that poultry litter is a source of bacteria and phosphorous in IRW waters.

Evidence of other sources of bacteria and phosphorous within the IRW is relevant to and undermines that assertion. This is especially true given that these alternate sources—wildlife; cattle; urbanization; erosion; waste water treatment discharge; the use of commercial fertilizer; etc.,—are often more proximate to the surface waters in question, and are not regulated specifically to prevent phosphorous runoff in the same manner as is the application of poultry litter. *See* Ex. 5 (Sullivan 4-8-09 Depo.) at 427:18-428:14 (listing sources of phosphorous in the IRW); *see generally* Defendants’ Motion for Partial Summary Judgment on Counts 7 and 8, Dkt. No. 2057 (May 18, 2009) (discussing various statutes regulating the application of poultry litter). The relevance of such evidence has been firmly established in this case. As the Tenth Circuit noted, it is “undisputed that humans, various wildlife, and numerous farm animals, including pigs, sheep, and cattle, rely on IRW lands and waterways, and harbor the various bacteria at issue in this case.” *Attorney General of the State of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 778 (10th Cir. 2009). And, “[a]lthough Oklahoma attempted, through its expert witnesses, to establish that poultry litter was a contributing source of the IRW bacteria, it did not account for these alternative sources of bacteria.” *Id.* at 778. As a result, Plaintiffs “failed to link land-

applied poultry litter and the bacteria in the IRW, so [they] could not meet even [the] low hurdle” applicable to plaintiffs seeking injunctive relief under RCRA. *Id.* at 777.¹

Evidence of levels of bacteria and phosphorous in other watersheds is similarly relevant to Plaintiffs’ failure to demonstrate causation.² If Plaintiffs are correct that by mere virtue of its presence in the IRW, poultry litter must be responsible for bacteria and phosphorous in IRW waters, then one could reasonably expect those levels to be substantially reduced in other watersheds that are similar in all relevant respects except for poultry farming.³ But, as Defendants’ evidence will demonstrate, that is not the case. *See, e.g.*, Ex. 6 (Connolly Report) at §§ 2.8, 6; *see also* Opinion & Order, Dkt. No. 1765 at 7. Indeed, Plaintiffs’ protestations as to the irrelevance of such evidence are further belied by their own efforts to develop similar “reference” evidence based on other reservoirs within the State of Oklahoma. *See, e.g.*, Ex. 7 (Cooke 12-4-08 Dep.) at 40:16-41:2; 105:12-106:25 (explaining Plaintiffs study of Broken Bow Reservoir as a “reference” lake to determine the impact of poultry litter on Lake Tenkiller, and concluding that “[i]t’s very fair to compare these two reservoirs.”). Finally, the Tenth Circuit

¹ Plaintiffs’ motion with regard to other sources within the IRW argues exclusively that such evidence is irrelevant to joint and several liability. As demonstrated below, that is not the case. Plaintiffs’ sole acknowledgement of the causation issue is their assertion that causation has somehow been conceded. *See* Dkt. No. 2436, at 6 n.2. Plainly that is not the case. The fact that phosphorous has many sources in the watershed says nothing with regard to contributors of phosphorous *to the waters of the IRW*. Plaintiffs’ have consistently failed to demonstrate a fate and transport basis for the movement of poultry litter constituents from field to waters of the State.

² The Court’s ruling slightly narrowing Dr. Sullivan’s testimony as to levels in watersheds other than the IRW does not alter this analysis. To the extent that sufficient data exists to make an appropriate comparison Dr. Sullivan remains free to testify as to bacteria or phosphorous levels in other watersheds. Moreover, Dr. Sullivan is not Defendants’ only expert to draw such comparisons. For example, Dr. Connolly compares Lake Tenkiller with Lakes Hugo and Sardis. *See* Ex. 6 (Connolly Report) at §§ 2.8, 6.

³ While Plaintiffs cite Federal Rule of Evidence 403, *see* Dkt. No. 2411 at 1, they base no substantive argument on it.

recognized the relevance of such evidence in this case, observing that “IRW bacteria levels appear not to differ from bacteria levels in other bodies of water throughout Oklahoma, even where poultry farming is less common.” *See Tyson Foods*, 565 F.3d at 778.⁴

As this Court and the Tenth Circuit have recognized, evidence of bacteria and phosphorous in other watersheds and alternate sources within the IRW are highly relevant to causation and are therefore properly admissible.

II. TESTIMONY AND OTHER EVIDENCE REGARDING OTHER CONTRIBUTORS OF BACTERIA AND PHOSPHORUS TO THE IRW IS RELEVANT TO DETERMINE THE AVAILABILITY OF JOINT AND SEVERAL LIABILITY

As set forth in the Defendants’ Motion for Partial Summary Judgment, evidence of other contributors of bacteria and phosphorus to the waters of the IRW is critical to determining whether joint and several liability is even available for Counts 4, 6, and 10 of this case. *See generally* Causation Motion. In the absence of action in concert, joint and several liability may apply if the harm suffered is “indivisible” and the defendants are “joint tortfeasors.” *Northup v. Eakes*, 178 P. 266, 268 (Okla. 1918). However, where the plaintiff has contributed to its own injury, the indivisible injury theory does not apply and, as a result, joint and several liability is not available. *See Walters v. Prairie Oil and Gas Co.*, 204 P. 906, 908 (Okla. 1922); *see also* Causation Motion at 21-25.

The State of Oklahoma has discharged, contributed to the discharge, or permitted the discharge of materials containing phosphorus compounds and bacteria into the soils and waters of the IRW. *See* Causation Motion, Undisputed Facts at ¶¶25-57. Evidence of the State’s

⁴ The excerpt Plaintiffs’ cite from Dr. DuPont’s deposition, *see* Dkt. No. 2411, at 2-3, says nothing regarding the relevance of such evidence to causation or transport issues.

contribution to its own injury is central, and therefore relevant, to determining whether joint and several liability is available for counts alleging an indivisible harm.

III. EVIDENCE REGARDING OTHER CONTRIBUTORS OF BACTERIA AND PHOSPHORUS TO THE IRW IS RELEVANT TO THE COURT’S FASHIONING OF INJUNCTIVE RELIEF, IF ANY

Plaintiffs posit that a party facing injunctive relief cannot avoid its liability “based on other contributing causes, testimony or evidence relating thereto” and therefore any such evidence should be excluded as irrelevant. *See* Dkt. No. 2436 at at 7-8. However, the issuance of injunctive relief is within the sound discretion of the court. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Because “[a]n injunction should issue only where the intervention of a court of equity ‘is essential in order effectually to protect property rights against injuries otherwise irreparable,’” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)), evidence regarding other contributors of bacteria and phosphorus levels in the IRW is relevant to determining whether the harm is irreparable. Indeed, as the Tenth Circuit noted, Plaintiffs’ failure at the preliminary injunction hearing to “establish that poultry litter was a contributing source of the IRW bacteria, [and to] account for these alternative sources of bacteria ... clearly left the district court with doubt about the potential ameliorating effects of a preliminary injunction.” *Tyson Foods*, 565 F.3d at 778. The evidence Plaintiffs now seek to exclude should elicit similar doubts at trial.

In the event that Plaintiffs meet their burden, the Court in fashioning injunctive relief will enjoy the power and flexibility to “mould [its] decree to the necessities of the particular case.” *Hecht*, 321 U.S. at 329. Evidence of other contributors, including Plaintiffs, to the injury in question would bear upon that calculation.

CONCLUSION

For the foregoing reasons, Defendants request that the Court deny plaintiffs' motions *in limine* and permit Defendants to present evidence of other contributors of phosphorus and bacteria to the IRW and of bacterial and phosphorus levels in waters other than those of the IRW.

Respectfully submitted,

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